***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF & APPENDIX

76-2097

OCT 13 1976

IN THE UNITED STATES COURT OF APPEALS

IN AND FOR THE SECOND CIRCUIT

NORMAN WILCOX, et al. )

Appellants )

V- )

Docket No. [redacted]

)

UNITED STATES OF AMERICA, )

Respondent. )

B
P/S

Brief and Appendix

Appeal from the order of the U. S. District Court denying motion to vacate pursuant to 28 U.S.C., 2255 without first conducting an evidentiary hearing.

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## ISSUE PRESENTED

Whether an attorney may make an independant determination to waive a personal fundamental constitutional right of client at a pre-trial suppression hearing where evidence heing heard can be controverted, and whether there was an adequate record for the District Court to deny and dismiss a motion to vacate under 28 USC, 2255 without having first conducted a full fact-finding evidentiary hearing?

## ARGUMENT

On 12 March '73, the District Court conducted a hearing on the Appellants' motion to dismiss the indictment in the instant matter. At the conclusion of such hearing, it had been intimated that the District Court asked counsel if they desired their clients presence at the pre-trial hearing that was about to begin; Attorney Thomas Clifford, counsel for co-defendant Donald Hall, was the only attorney to respond that, "I have no request". No other attorney responded at this time. Before ascertaining from each of the remaining attorneys what their positions were in regards to their clients presence, the District Court began hearing evidence in the absence of appellants'. Althought none of this information is reflected in the suppression hearing transcript of 12 March '73, the government states such information is reflected in an additional set of transcripts also dated 12 March '73. With the exception of co-defendant Donald Hall, all appellants' were in custody, however, Wilcox and Bailey were the only co-defendants present at the courthouse on 12 March '73, and had no knowledge that the suppression hearing had commenced in their absence.

Co-defendants, Lynn Morrow and Richard Jenkins, in response to the governments' interrogatories states they remained at their respective jails on 12 March '73 and therefore could not have been present in the courthouse at the time of the hearings. Hall states he was on bond and on the date of the suppression hearings', he, likewise was not present at the courthouse.

Appellants' cannot accept, and urge the Court not to accept,

as palatable any argument that they agreed with counsel to waive their rights to be present at the pre-trial suppression hearings, or that counsel made such a determination on his own for strategic and tactical reasons.

In opposition to the motion to vacate in the District Court, the government does not dispute the fact that the sixth amendment of the United States Constitution and Rule 43 of the Federal Rules of Criminal Procedures guarantees a defendant the right to be present at a pre-trial suppression hearing where evidence being heard might be controverted. Se United States v. Clark, 475 F.2d 240, 2nd Cir. (1973). The governments' sole contention was that; "for tactical reasons each attorney chose to exclude his client from the hearings, and that this dicision waived petitioners right to be present as effectively as if the Court had conducted an on-the-record voir dire of each petitioner before acceding to his absence".

In Henry v. Mississippi, 379 U.S. 443 (1965), the Supreme Court ruled that; counsel in criminal proceedings may waive certain of their clients constitutuonal rights, even if the waiver is taken without prior consultation with the defendant.

Implicit in the Supreme Court's approval of this "waiver rule", is the recognition that there must be some allocation of authority between attorney and client during the course of a criminal trial.

On a practical level, the procedure is mandated by considerations of judicial economy and efficiency, since

any contrary approach would require the defendant's direct participation in all aspects of the trial. For this reason, a broad "waiver-rule" allowing counsel considerable leeway in formulating a trial strategy is considered necessary. See: Winters v. Cook, 489 F. 2d 174. However, there are limitations to the Supreme Court's holding in Henry. Certain constitutional rights have been held to be of such "fundamental importance" that Courts have determined that they cannot be waived by trial counsel, but tather, must be waived by the defendant.

The development of the "waiver rule", and its exceptions, is discussed at some length in Note, Developments in the Law-Federal Habeas Corpus, 83 Harv. L. Rev. 1038 (1970). As was stated in that article:

> "The waiver test was originally developed to deal with "fundamental constitutional rights". It appears that the dicisive factor in a decision to require a personal waiver is the fundamental nature of the right at stake. Certain rights are inherently personal and requires personal waiver as a matter of constitutional law; but in other instances as well as the determination of the waiver question rest on the importance, in a constitutional sense, of the right in question--it is difficult to find a sound rationale for this line drawing among constitutional rights. The current

distinction between fundamental rights only incidentally reflect the functional purpose, that lie behind giving the attorney any authority to bind his client at all". 83 Harv. L. Rev. 1111-12.

The Court of Appeals for this Circuit has held that the right to be present, even during the trial itself, may be waived, U. S. v. Tortora, 464 F. 2d 1202, and appears to assume that in Court statements of the attorney may be sufficient to effect the waiver, U. S. v. Crutcher, 405 F. 2d at 243; however, the records and files of the instant case lacks any reason whatsoever what the District Court considered before acceding to Appellant's absence. In opposition to the motion to vacate, the government, in an apparent attempt to supplement the record, submitted ex parte affidavits of persons involved in the hearings.

These affidavits fail to establish any persuasive justification that would permit defense counsel to make an independant determination to waive appellant's rights, and in addition, as a matter of law, ex parte affidavits are not conclusive proof against any facts put in issue, and are no more than mere evidentiary facts to be taken into consideration along with all other evidence in the case. See Taylor v. U. S., 487 F. 2d 307; Walker v. Johnston, 312 U.S. 275; and Whalley v. Johnston, 316 U.S. 101. Therefore, the District Court did not have before it an adequate record upon which its findings and conclusions could be based without further adversarial

inquiry in the form of an evidentiary hearing with all appellant's present.

Appellant's were surely entitled to assist their attorneys in cross-examining and controverting the governments' witnesses, and in developing these matters further at the suppression hearing for the following reasons.

(I). On 14 September '72, Appellant's were present when Danbury Police and agents of the FBI gained entrance to the residence of 42-A Virginia Avenue, Danbury Conn., and dispute the voluntariness of Mrs. Gary's consent for the officers to enter, and the observations they made which were the basis for a search and seizure warrant being issued for the search of the premises the following day.

(II). Appellant Hall was present when Charlotte Police and agents of the FBI asked his wife Magnolia Hall for permission to search her automobile and disputes the voluntariness of her consent. So does Mrs. Hall.

(III). Appellant Wilcox was arrested by a New Jersey State Trooper after contraband was seized after a search of his motorcycle's saddlebag and disputes the Troopers version of the incident and could have presented additional evidence to support his veracity had he known of the Troopers version of the incident.

The Supreme Court has consistently taken the position that a waiver of a constitutional right or privilege is to be measured against a high standard. As the Court stated in Johnson v. Zerbst, 304 U.S. 458;

"It has been pointed out that Courts

> indulge every reasonable presumption against waiver of fundamental constitutional rights and that we do not presume acquiesence in the loss of fundamental rights". 304 U.S. at 464.

In the instant matter, the District Court has weighed Appellant's rights against the possibility that the Appellant's would have been identified by government witnesses if Appellant's were present at the hearings. Such reasoning lacks persuasive justification in view of the fact that the witnesses who were supeanoed for the first segment of the hearings that commenced on 12 March '73 were already acquainted and familiar with Appellant's.

Had the government desired to determine whether one or more of its witnesses were able to identify an Appellant as a participant in the robbery, it had the authority to cause a line-up to be conducted. U. S. v. Wade, 388 U.S. 218.

## CONCLUSION

It is submitted by Appellants that because there has been no showing of persuasive justification for waiving their rights at the pre-trial hearings, and the fact the District Court has made its findings and conclusions on an inadequate record, that the Court remand this cause for a new suppression hearing at which all Appellant's are present.

Respectfully submitted,

Norman Wilcox

Norman Wilcox

IN THE UNITED STATES COURT OF APPEALS

IN AND FOR THE SECOND CIRCUIT

NORMAN WILCOX, ET AL.
APPELLANTS

V

UNITED STATES OF AMERICA,
APPELLEE

Docket No. 76-2092

C E R T I F I C A T I O N

I, Norman Wilcox, certify that the contents of the instant brief submitted in behalf of all defendant/appellants is true and correct to the best of my knowledge, information, and belief, and that one copy of the same was mailed this 8th day of October 1976 by placing it in the mailbox located at the Atlanta Federal Penitentiary, Atlanta, Ga., 30315, to the office of the United States Attorney in Bridgeport, Connecticut.

Norman Wilcox

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Sworn to and subscribed to me

this 8 th day of Oct. 1976

Charles C. Moore

Notary Public Authorized by the Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004).